No. 7003

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLARENCE W. MORRIS,

Appellant,

vs.

HARRY L. HUSSMAN and CAROLINE HUSSMAN,

Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

The appellees, Harry L. Hussman and Caroline Hussman, husband and wife, and residents of Texas, brought this suit against the appellant, Clarence W. Morris, and his brother, Chester A. Morris, both residents of California, to recover the sum of $4391.84, which appellees had been obliged to pay in order to prevent foreclosure of a mechanic's lien upon certain property belonging to them.

Chester Morris was not served with process and the suit proceeded against Clarence Morris alone. He filed a demurrer (Tr. p. 9), which the trial court overruled (Tr. p. 12). He then filed an answer.

The case was heard upon an Agreed Statement of Facts (Tr. pp. 23-52), and the trial court gave judgment for the plaintiff as prayed (Tr. p. 52). Clarence Morris has taken this appeal.

THE FACTS.

The summary of facts in appellant's brief (pp. 1-3) is incomplete, and in several particulars contrary to the Agreed Statement. The facts shown by the Statement are as follows:

Appellees owned certain real property in San Francisco, of which, in 1930, the defendant Chester Morris took a lease (Exhibit "A" to the complaint (Tr. pp. 7-9), made a part of the Agreed Statement of Facts (Tr. pp. 24-25)). Chester Morris then made a contract (Tr. pp. 29-41) with Barrett & Hilp, a contracting firm, to construct a miniature golf course on the property. On this contract the appellant endorsed the following guarantee (Tr. pp. 41-42):

> "I hereby guarantee the payment of any balance that may be due Barrett & Hilp and agree to pay the same within 70 days after completion of said golf course.
>
> Clarence W. Morris."

Barrett & Hilp built the golf course, but the defendants failed to pay a balance of $4391.84 due upon the contract (Tr. pp. 25-26). Thereafter, Barrett & Hilp recorded a claim of mechanic's lien against the property (Tr. p. 26). They assigned the claim of lien, together with their claim against both defendants, to Credit Clearance Bureau (Tr. p. 26) which filed suit to foreclose the lien (Tr. pp. 46-52). The appellees, to protect the property from the lien, paid the contract balance to Credit Clearance Bureau (Tr. p. 27). Contemporaneously with this payment, Credit Clearance Bureau, with the knowledge and consent of Barrett & Hilp, made an assignment to the appellees of the contract and of all rights against both Chester

and Clarence Morris (Tr. pp. 27, 42). The statements in appellant's brief (pp. 2-3) that the only assignment to appellees was made by Barrett & Hilp, from which appellant argues that it was of no effect because of the earlier assignment to Credit Clearance Bureau, is contrary to the Agreed Statement of Facts (Tr. p. 27). This matter is fully developed in our argument.

THE QUESTIONS INVOLVED AND SUMMARY OF THE ARGUMENT.

Appellant makes four contentions, the nature of which and of our argument in reply to them, is as follows:

First. "There is no cause of action in appellees" (Appellant's Brief, p. 3).

Appellant argues that the trial court should have sustained his demurrer on the ground that appellees' assignment is from Barrett & Hilp, and that this assignment is without effect because made after Barrett & Hilp had assigned their rights to Credit Clearance Bureau. The fact, however, is that the claim was assigned by Credit Clearance Bureau (Tr. p. 27). Further, appellant's contention takes no account of the fact that appellees paid to *Credit Clearance Bureau* the balance due on the contract, and that the first of the two causes of action in the complaint is based on the right of subrogation arising from this payment. The demurrer, therefore, was properly overruled, even without reference to the assignment.

Second. "Appellant was exonerated as surety by the release of the lien by appellees' assignor" (Appellant's Brief p. 6).

Appellant's argument is that, if he had paid off the contract balance, he would have become subrogated to the mechanic's lien. This contention ignores the fact that appellant refused to pay the debt, notwithstanding Barrett & Hilp's demand for payment (Tr. p. 25). This contention further ignores the fact that the lien was on property belonging to appellees. Appellant could not, we submit, have obtained by subrogation the security of a mechanic's lien on appellees' property, which his principal, Chester Morris, was bound to protect from liens. The rule is thoroughly settled that a surety, who pays a debt, is subrogated to such security as has been furnished the creditor by the *principal debtor or some one else legally liable for payment of the debt;* he is not entitled to the security of property belonging to third persons (authorities *infra*).

Third. "The surety in this case is exonerated by the surrender without his knowledge or consent" (Appellant's Brief, p. 10).

This is the same point as that stated under appellant's second heading.

Fourth. "Appellees have been guilty of laches" (Appellant's Brief, p. 11).

The contention is that the appellees did not post a notice of nonresponsibility upon the property under Section 1192 of the Code of Civil Procedure. There is nothing on this subject in the Agreed Statement. Furthermore, it is obvious that appellant was not prejudiced by the fact that no notice was filed. If it had been filed, then the property would not have been subject to any mechanic's lien, and there would have been no basis whatever for appellant's

present contention that he was indirectly entitled to the security afforded by such lien. Still further, we submit, that if the notice was a matter of concern to appellant, he, as a lawyer living in San Francisco, was in a much better position to know about the need for it and to arrange for its posting than were appellees, who were laymen living in Texas.

ARGUMENT.

FIRST: THE COMPLAINT STATES A CAUSE OF ACTION IN EACH OF ITS TWO COUNTS, AND APPELLANT'S DEMURRER WAS PROPERLY OVERRULED. (Answering Appellant's Brief, pp. 3-5.)

Appellant's first contention is stated in his brief as follows (pp. 3-4):

> "The demurrer to the complaint should have been sustained because the assignments hereinbefore set forth show conclusively that Barrett & Hilp assigned any and all rights which they possessed to the Credit Clearance Bureau and, of course, the Credit Clearance Bureau then became the owner of any rights that existed. The second assignment made does not come from the Credit Clearance Bureau at all, but is a second assignment made by Barrett and Hilp, made at a time they had absolutely no color or claim or title therein and made when they had nothing to assign."

The facts do not support this argument. The Agreed Statement of Facts does not state that Barrett & Hilp assigned to appellees; it expressly states that Credit Clearance Bureau made the assignment to appellees (Tr. p. 27):

> "On or about April 13, 1931, *Credit Clearance Bureau assigned to plaintiffs its claim against defendants and each of them*, and at the same time delivered to plaintiffs that certain counterpart or duplicate of said contract dated October 18, 1930, which had been retained by said Barrett & Hilp, and of which exhibit 'B' is a copy. Contemporaneously with the delivery to plaintiffs of said contract, exhibit 'B,' and with the knowledge and consent of said Credit Clearance Bureau, the names of plaintiffs, Harry L. Hussman and Caroline Hussman were written into the blank space in the assignment dated April 13, 1931, which is endorsed on said contract, exhibit 'B.'"

On pages 2 and 3 of his brief appellant quotes two assignments executed by Barrett & Hilp. The mere quotation of these assignments, without any reference to the circumstances above quoted by us from the Agreed Statement of Facts, is misleading and gives a wrong impression of what occurred. The assignment to appellees, which is dated April 13, 1931, was not an independent document, as would be inferred from appellant's brief, but was a form endorsed on the building contract between Chester Morris and Barrett & Hilp. *The document contained blank spaces in which the names of the appellees were written with the knowledge and consent of both Credit Clearance Bureau and Barrett & Hilp, as is set out in the Agreed Statement of Facts.* This was done, as is also set out in the Agreed Statement, contemporaneously with the payment of the contract balance by appellees *to Credit Clearance Bureau* and with the delivery of the contract which was being assigned (Tr. p. 27).

Even if the Agreed Statement did not say, as it does, that

> "On or about April 13, 1931, Credit Clearance Bureau assigned to plaintiffs its claim against defendants and each of them * * *"

and even if this statement could, as we submit it cannot, be impeached by appellant, in view of his stipulation that

> "It is hereby stipulated by and between the parties to the above entitled action that the facts hereinafter set forth are true * * *
>
> It is further stipulated that no evidence shall be offered or given by any party other than that set forth in said agreed statement of facts * * *" (Tr. p. 23)

still the circumstances would be sufficient to show a good assignment from Credit Clearance Bureau to appellees. An assignment of a chose in action need not be in any particular form, and there can be no doubt, we submit, of the intention to assign to appellees which was manifested when Credit Clearance Bureau delivered the contract to appellees and when their names were written into the form of assignment endorsed on the contract.

In *Wiggins v. McDonald,* 18 Cal. 126, the court said (p. 127):

> "It is not essential to the validity of the assignment that any particular form of transfer should have been adopted."

See, also:

Ryan v. Maddux, 6 Cal. 247, 248;
Puterbaugh v. McCray, 25 Cal. App. 469;
Bruno v. Severini, 51 Cal. App. 163, 173;
3 *Cal. Jur.* 262, et seq.

In *Lucas v. Pico*, 55 Cal. 126, a contract with an endorsement containing a blank space for the insertion of the name of the assignee was delivered, and it was held that the party to whom it was delivered might fill his own name in the blank space.

To the same effect is *Thomas v. Fursman*, 39 Cal. App. 278. The facts and ruling are indicated by the following quotation from the opinion (p. 280):

> "It is contended that the assignment, at the time it was executed by Varney, was made in blank, that is to say, the name of the assignee was omitted therefrom. This name was afterward inserted. Varney received one thousand dollars for the assignment. The assignment was produced by plaintiff's counsel. Who, if anyone, was authorized to deliver this to the plaintiff does not appear. But the fact that he did have it in his possession, and produced it at the trial, was evidence of its delivery in the form in which it was offered. And further it has been held that blanks of any description left in writings not under seal may, except so far as they may be prohibited by the statute of frauds, be filled pursuant to parol authority, and it has been laid down generally that if one signs an instrument containing blanks, he must intend it to be filled in by the person to whom it is delivered. (2 C. J., sec. 119, p. 1242; *Hunt v. Adams*, 6 Mass. 519.) This is just in this case, for Varney received one thousand dollars in money for the assignment and unquestionably intended to convey his interest in the contract in suit by the assignment."

We believe there is no purpose in discussing the cases cited by appellant on pages 4 and 5 of his brief. Undoubtedly the rule is (and this is the point to which

appellant cites these cases) that a cause of action to support recovery must be *in* the plaintiff as well as *against* the defendant, but this rule, we submit, has no bearing on the case at bar. The quotations made from the Agreed Statement of Facts show that appellees are the assignees of Credit Clearance Bureau and that Credit Clearance Bureau, prior to assigning to appellees, was the assignee of Barrett & Hilp. Appellant does not deny that Barrett & Hilp had a cause of action against him at the time they made the assignment to Credit Clearance Bureau. Appellees, as assignees of Barrett & Hilp and Credit Clearance Bureau, therefore, are clearly entitled to maintain this suit. That the cause of action was assignable is not questioned by appellant and is, we submit, clear under the authorities.

Thus, the court said in *Wing & Bostwick Co. v. United States Fidelity & Guaranty Co.* (C. C. N. Y.), 150 Fed. 672, in sustaining an assignment of a claim against the surety on a building contract (p. 675):

> "Stress is laid upon the proposition that the indemnity bond, being special in its character, would run only to the building contractor, and not to his assignees; the defendant not having consented to an assignment. The case of Levy v. Cohen, 45 Misc. Rep. 95, 91 N. Y. Supp. 594, particularly cited in support of this proposition, was not sustained on appeal; the appellate court (Levy v. Cohen, 103 App. Div. 195, 92 N. Y. Supp. 1074) decisively holding that, as the bond was not given because of any trust or confidence reposed in the contractor, there was no special guaranty. * * * I conceive the law to be that a bond such as here considered, given expressly to indemnify the obligee from loss sustained under a building contract, is general in its character, and

it is immaterial whether the obligee assigns the same to enable another to recover damages sustained."

In *Reios et al. v. Mardis et al.*, 18 Cal. App. 276, the plaintiff was assignee of a lessor and of a written guaranty addressed to the lessor, which had been endorsed on the lease (as the guaranty here was endorsed on the building contract) to secure the payment of the rent reserved. It was held that the plaintiff could, in his own name, as assignee, against both the lessee and the guarantor maintain suit to collect the rent. The whole point of the guarantor's argument was that his obligation was personal to the lessor, and could not be enforced by an assignee. To this point the Court said (p. 279):

"In support of the lower court's ruling sustaining the demurrer, it is contended that a contract of guaranty cannot be enforced except by the party to whom it was given; that the guaranty in the present case was addressed to the lessor named in the lease without a provision permitting its assignment, and therefore was personal to him, and could not be assigned so as to give the assignees a right of action thereon."

The court pointed out that the common-law rule of non-assignability does not prevail in California, and that all claims are assignable in this state unless expressly made non-assignable (p. 280), and continued (pp. 280-281):

"Aside from these considerations, the language of the guaranty, which is set out in full in the complaint, indicates that it was executed and indorsed upon the back of the lease contemporaneously with the execution of the lease, and thereby became a part

of the lease itself (Jones on Landlord and Tenant, sec. 662; *Otto v. Jackson,* 35 Ill. 349; *Evoy v. Tewksbury,* 5 Cal. 285; *Hazeltine v. Larco,* 7 Cal. 32; *Otis v. Hazeltine,* 27 Cal. 80). This being so, the lease and the guaranty must be construed to be but one instrument, constituting a single contract, upon which the liability of the guarantor, to the extent of its obligation, was commensurate with that of the lessee (*Bagley v. Cohen,* 121 Cal. 604 (53 Pac. 1117)), and the assignment carried with it the same remedies for the recovery of the rent reserved, or for the nonperformance of the terms of the lease, as the assignor might have had in the first instance (Civ. Code, sec. 821)."

Other cases holding that claims against sureties or guarantors are assignable are:

Murphy v. Luthy Battery Co., 74 Cal. App. 69 (guaranty of lease);

Anglo-California Trust Co. v. Oakland Railways, 193 Cal. 451, 466 (guaranty of corporate notes);

Bank of America v. Granger, 115 Cal. App. 210, 218, 219 (guaranties of bank loans);

United States v. Rundle (9th C. C. A.), 100 Fed. 400, 403 (guaranty of building contract);

Title Guaranty & Trust Co. v. Crane Co., 219 U. S. 24, 35 (guaranty of building contract; following *United States v. Rundle, supra*).

We point out, also, that appellant's contention with reference to the assignment is that the trial court should have sustained his demurrer (App. Brief, p. 3). The complaint, however, contains two causes of action, of which only the second is based on the assignment (Tr.

p. 5). The first cause of action rests on the doctrine of subrogation. It is settled that where a debt is paid by a person in order to protect his property, his right of subrogation is against sureties or guarantors of the principal debtor as well as the principal himself (*Title Guaranty & Surety Co. v. Duarte,* 54 Cal. App. 260).

The sufficiency of the first cause of action is not questioned by appellant. The demurrer, therefore, was properly overruled, even without reference to the assignment.

SECOND: APPELLANT WAS NOT ENTITLED TO A LIEN UPON APPELLEES' PROPERTY AND COULD NOT HAVE OBTAINED SUCH LIEN EVEN IF HE HAD PAID THE BALANCE DUE BARRETT & HILP. (Answering Appellant's Brief, pp. 6-10.)

Appellant's second point we understand to be that if he, as surety, had paid the claim he would, by subrogation, have obtained the mechanic's lien against appellees' property; that appellees, by paying the claim, deprived him of this right, and that he, therefore, is exonerated.

This argument, to begin with, assumes that appellant would have paid the balance due on the contract. The fact, however, is that he refused to do so. The Agreed Statement of Fact says (Tr. p. 25-26):

> "Defendants paid to Barrett & Hilp the sum of $1250 but they and each of them, notwithstanding the demand of said Barrett & Hilp on them and each of them, have failed and refused to pay any part of the balance of said contract price, to-wit: the sum of $4391.84."

Manifestly, appellant is in no position to argue that the payment of the claim by appellees *deprived* him of a right to do something which he had refused to do.

The rule is that

> "A surety may waive his rights as subrogee by express agreement, or by implication by the doing of an act inconsistent with the enforcement of such rights * * *" (60 C. J. 750).

We submit that appellant's refusal to pay the debt was an act of that character.

Further, we submit that appellant, even if he had paid the contract balance, could not have obtained by subrogation any right or lien against the property of the appellees. The general principle invoked by appellant, namely, that a surety or guarantor who pays a debt is entitled to be subrogated to securities held by the creditor, is subject to the qualification, which is just as well settled as the rule itself, namely, that such right of subrogation extends only to securities furnished *by the principal debtor or by some other person legally bound to pay the debt.* The right never extends to securities furnished by third persons who, like appellees, were under no obligation for the principal debt.

The foregoing principle was pointed out in *Western Surety Co. v. Walter,* 44 S. D. 112, 182 N. W. 635, in construing a South Dakota statute identical with the pertinent California statute involved in this case (Cal. Civ. Code, Sec. 2849). The court there said (p. 637):

> "Does section 1510, R. C. 1919, give to appellant the right of subrogation now claimed by it. Such section provides:

> 'A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety, at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.'
>
> We think this section does not apply for two reasons: First. This section is intended merely as a declaration of the well-established rule existing at the time it was adopted, and therefore the 'security,' to the benefit of which one entitled to subrogation succeeds, is security furnished the 'creditor' or 'co-surety' by the principal debtor, and has no reference to security or indemnity furnished by a stranger. Eaton on Equity, Sec. 251; 3 Pomeroy's Equity Jurisprudence, 1419; Leggett v. McClelland, 39 Ohio St. 624."

In the case of *Leggett v. McClelland,* 39 Oh. St. 624, quoted in the foregoing case, where a surety was held not entitled to be subrogated to rights against security which had been advanced from the separate property of the wife of the principal debtor, the court said (p. 627):

> "This indemnity was not furnished by the principal. It was the separate estate of his wife and not liable for his debts. The wife, for reasons satisfactory to herself, mortgaged her separate property for the sole and exclusive benefit of defendant. It was no fraud upon the creditor or the co-surety to indemnify one surety. As it was not the property of the principal, no trust arose, either in favor of the creditor or of the co-sureties, in the absence of any showing that the bond was accepted, or that the co-sureties signed on the faith of such indemnity."

The principle is stated as follows in *Corpus Juris,* where many authorities are cited:

> "Collateral given by third persons. It has been said that a surety will not be subrogated to collateral security or indemnity which has been furnished the creditor by a third person or stranger * * *" (60 C. J. p. 759).
>
> "Generally a surety will be subrogated to any rights which the creditor may have against a third person, *who as to the principal is primarily liable for the debt or default* which the surety has been compelled to satisfy, or who, although not liable to the principal, should equitably be regarded as primarily liable as to the surety; but, with respect to the latter, subrogation will be denied if the equities of the third person are equal or superior to those of the surety" (60 C. J. p. 763).
>
> "A surety will, in general, be subrogated to any collateral security *which has been given the creditor by the principal,* or which has been given the creditor by a co-surety, to secure payment of the debt for which the surety is bound" (60 C. J. p. 757).[1]

The same principle is expressed in the Civil Code, not only in Section 2849, mentioned in connection with *Western Surety Co. v. Walter, supra,* but also in Section 2848, as follows:

---

1. Appellees and appellant are not cosureties: "A cosurety is one who undertakes with another to be responsible for the debt or duty of a third person": (50 C. J. 278.)

Monson v. Drakeley, 40 Conn. 552;

United States Fidelity & Guaranty Co. v. Naylor, 237 Fed. (9th C. C. A.) 314.

"sureties are not cosureties, where they are not bound for the same obligation or principal, or where, although bound for the same obligation, they do not occupy between each other the same relative position in respect of such obligation": (50 C. J. 279.)

Day v. McPhee, 93 Pac. (Colo.) 670;

Frederick Snare Corp. v. Globe Indemnity Co., 194 N. Y. S. 353.

> "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has *against the principal* to the extent of reimbursing what he has expended * * *."

See also:

Cawston Ostrich Farm v. Salomon, 72 Cal. App. 550, 558.

Appellees were in no sense liable for the default of Chester Morris in the performance of his obligation to Barrett & Hilp. Because the law gave Barrett & Hilp security, by means of a mechanic's lien, for the work they had done on the property of appellees and which had been leased to Chester Morris, is no reason why appellant, if he had paid Barrett & Hilp, could have become subrogated to the rights of Barrett & Hilp to the mechanic's lien. There was no privity whatever between appellant and appellees as to the work done by Barrett & Hilp.

There is, we submit, no occasion to discuss the cases cited by appellant on pages 6, 7, 8, 9 and 10 of his brief. They deal only with the general principles of the law of suretyship, as to which there is no dispute. Appellant has cited no case which supports his contention that he had a right to the benefit of the lien which Barrett & Hilp recorded against the property of appellees. The cases cited by appellant do not conflict with the well-settled principle, which is controlling here, and to which we have referred, that the right of a surety to subrogation never extends to security furnished by a third person, who is not under obligation for the principal debt.

Before leaving this subject, we point out that even by assignment appellant could not have acquired any

rights to the lien of Barrett & Hilp. It is well settled in California that where a surety or guarantor pays a debt, such payment extinguishes the debt and the surety cannot keep the debt alive by taking an assignment.

Johnson v. Mortgage Guarantee Co., 117 Cal. App. 416, 420, 4 P. (2d) 208;

W. H. Marston Co. v. Fisheries Co., 201 Cal. 715, 258 Pac. 933.

He, of course, has his right of subrogation but, as we have already shown, that right does not extend to security belonging to third persons not liable for the debt.

THIRD.

The arguments made by appellant in his third point are the same as those made in his second, and we have answered them in our second point.

FOURTH: LACHES.

The argument that appellant makes on the subject of laches is, we believe, entirely beside the point. Whether or not appellees took any step, permitted to them by law, to protect their property against the claim of Barrett & Hilp, who made improvements thereon, can, we submit, in nowise affect the liability of the appellant as surety for his brother under the contract which his brother made with Barrett & Hilp for these improvements. Appellant's suretyship was additional security, independent and entirely apart from the security which the law gave Barrett & Hilp by means of the right to file a lien on the property on which they had made improvements. Any action or nonaction on the part of

appellees, as owners of the property, could in nowise have affected the right of Barrett & Hilp to recover from the appellant as surety on his brother's contract. The argument with respect to laches cannot, we submit, be used to defeat the obvious right of the appellees by reason of their subrogation, to recover from the appellant the moneys which they paid Credit Clearance Bureau, as assignee of Barrett & Hilp, and which the appellant had guaranteed to pay in the event that his brother did not pay the same.

Furthermore, appellant could not have been benefited in any way if the appellees had filed a notice of non-responsibility, and he, therefore, cannot predicate any argument on the fact that it was not filed. Had the notice been filed, then appellees' property would not have been subject to any lien, and in such event the only recourse of Barrett & Hilp would have been against Chester Morris and appellant as surety for Chester Morris. In other words, if the appellees had filed a notice of non-responsibility, there would have been nothing as to which appellant could have even claimed a right of subrogation.

We respectfully submit that the judgment should be affirmed.

Dated, San Francisco,
June 1, 1933.

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